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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TAMESHA WINDOM, Defendant and Appellant.	B211495 (Los Angeles County Super. Ct. No. NA077766)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed as modified.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Julie A. Harris, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Tamesha Windom appeals from the judgment entered after she was convicted by a jury of second degree robbery, assault with a deadly weapon (a car) and commercial burglary. On appeal, defendant contends the evidence is insufficient to support the assault with a deadly weapon conviction and the trial court erred in failing to stay sentences on the assault with a deadly weapon and burglary convictions under Penal Code section 654.[1] We conclude the evidence is sufficient to support the assault with a deadly weapon conviction, but agree the sentence imposed violated the proscriptions against multiple punishment.

FACTUAL AND PROCEDURAL BACKGROUND

Summary of Trial Evidence

On February 23, 2008, defendant entered a Walmart Store in Torrance. Marc Skinner (Skinner), a loss prevention officer, watched defendant take health and beauty items from a store shelf, place them inside a large shopping bag, and leave the store without making payment. Skinner followed defendant out of the store and into the parking lot.[2]

Defendant reached her car, put the shopping bag on the car floor and got into the driver's seat. Skinner approached the open driver's door, identified himself to defendant, and inquired about the unpaid merchandise in her bag. Defendant showed Skinner the contents of her purse and denied having any unpaid merchandise in her possession.

By this time, Skinner's partner, Pierre Botnem, had arrived. When he directed Skinner's attention to the shopping bag on the car floor, defendant turned on the ignition.

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[1] All further statutory references are to the Penal Code.

[2] An unidentified male confederate was with defendant inside the Walmart store, where he was later found by police and arrested.

Skinner attempted to pull her out of the car. With the driver's door still open, defendant shifted the car into reverse and began to back up quickly, although there was no car parked in front of her. To avoid being hit by the car door, Skinner jumped onto the door frame of the driver's side. He told defendant to stop the car, but she continued to drive in reverse. Skinner remained on the door frame, grabbing the steering wheel with one hand and holding onto defendant with the other hand. After backing up about 10 feet, defendant stopped, shifted the car into drive, slammed the door on Skinner's hand, and sped away.[3]

Defendant neither testified nor presented other evidence in her defense.

Verdict and Sentence

The jury convicted defendant of committing second degree robbery of Skinner, assault with a deadly weapon against Skinner and burglary of the Walmart store. The trial court imposed a state prison term of three years, consisting of the middle term of three years for second degree robbery, and concurrent two-year terms for assault with a deadly weapon and for commercial burglary.[4]

DISCUSSION

1. *Substantial Evidence Supports the Assault with a Deadly Weapon Conviction*

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of

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[3] The jury viewed a videotape of what occurred both inside the Walmart store and in the parking lot.

[4] Defendant was also sentenced to a concurrent term of 16 months for violating probation in Los Angeles Superior Court case No. BA326746.

fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Golde* (2008) 163 Cal.App.4th 101, 108 (*Golde*).)

Defendant argues the evidence is insufficient that she intended to use her car as a deadly weapon by striking Skinner. "At most, she drove recklessly for a few feet, an offense for which she was not charged." I n an odd twist of logic, defendant claims it was Skinner's own conduct of jumping onto a moving car that brought about defendant's application of force. Her claim is without merit.

"Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment[.]" (§ 245, subd. (a).)

To establish an assault, "the prosecution need not prove the defendant specifically intended to cause injury. Rather, the defendant need only have 'the general intent to willfully commit an act the direct, natural and probable consequences of which[,] if successfully completed[,] would be the injury to another.' [Citation.] 'The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another . . . .' [Citation.]" (*People v. Miller* (2008) 164 Cal.App.4th 653, 662-663.)

"[M]ere recklessness or criminal negligence" is not sufficient to establish the crime. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Instead, the defendant "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known." (*Ibid.*)

Here, there is sufficient evidence to support the findings that defendant made conscious efforts to escape from Skinner using her car in a manner likely to produce great bodily injury. From the witnesses' testimony, the jury could reasonably infer that defendant knew Skinner was standing between her and the open car door, such that if the car traveled rapidly in reverse, its moving door would collide with Skinner. Additionally,

the jury could reasonably have found that after Skinner jumped onto the door frame to avoid being hit, defendant moved her car to eject Skinner so she could flee, by continuing to back up rapidly, braking long enough to shift gears, and then speeding away.

Citing *People v. Jones* (1981) 123 Cal.App.3d 83 (*Jones*) and *People v. Cotton* (1980) 113 Cal.App.3d 294 (*Cotton*), defendant argues that her driving were merely careless or reckless and did not reflect an intent to commit battery on Skinner.

Jones and *Cotton* are not helpful to defendant. In those cases, the defendants were being pursued by police and, during the chases, struck vehicles and injured victims. (*Jones, supra*, 123 Cal.App.3d at p. 87; *Cotton, supra*, 113 Cal.App.3d at pp. 296-298.) In *Jones*, the assault with a deadly weapon conviction was reversed because the Court of Appeal concluded there was insufficient evidence to show Jones intended to commit a battery or "'an act the natural consequences of which is the application of force on the person of another.'" (*Jones, supra*, at pp. 96, 98.) In *Cotton*, the trial court erred in concluding that reckless driving in violation of Vehicle Code section 23104 "per se generated a transferable intent to commit a battery via automobile in violation of Penal Code section 245, subdivision (a)." (*Cotton, supra*, at p. 307.)

Neither case is representative of the circumstances here, where defendant, in attempting to escape with stolen merchandise, deliberately maneuvered her car to prevent Skinner from detaining her, fully aware that injury to him "would directly, naturally and probably result from his [or her] conduct." (*People v. Williams, supra*, 26 Cal.4th at p. 788.)

Defendant attempts to distinguish this case from *Golde, supra*, 163 Cal.App.4th at page 109 [the defendant repeatedly accelerated toward the victim and maneuvered the car in an attempt to chase her down as she attempted to avoid being hit], *People v. Russell* (2005) 129 Cal.App.4th 776, 779 [the defendant pushed victim into path of oncoming car after victim refused to give defendant money], *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707-709 [the defendant accelerated his pickup truck close to two victims with whom he had contentious relations], and *In re Brian F.* (1985) 167 Cal.App.3d 672, 675 [the defendant accelerated his car in reverse, striking and severely

injuring two victims], cases in which felony assault convictions were affirmed. Despite defendant's claim to the contrary, those cases are more akin to the facts here, where defendant used her car in a violent manner against Skinner, i.e., defendant willfully used her car to apply force against Skinner likely to result in great bodily injury. Substantial evidence supports defendant's conviction for assault with a deadly weapon.

2. *Trial Court Erred by Failing to Stay Sentence on the Assault with a Deadly Weapon and Burglary Convictions*

Section 654 is intended to ensure a defendant's "punishment will be commensurate with his [or her] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statue bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Conversely, where a defendant commits multiple criminal offenses during a single course of conduct, he or she may be separately punished for each offense that he or she committed pursuant to a separate intent and objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

Whether a single course of conduct is divisible into different offenses based on separate objectives and intents is a question of fact for the trial court, and its express or implicit findings will be upheld on appeal when they are supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) In this regard, "[w]e review the trial court's determination in the light most favorable to the [People] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*Ibid*.)

Defendant contends, the People acknowledge, and we agree the concurrent sentence for burglary was imposed in violation of section 654 because her single objective in committing both offenses was to commit theft and to successfully escape.

However, defendant further argues the concurrent sentence imposed for assault with a deadly weapon was improper because this offense was also incident to defendant's

objective of "shoplifting merchandise from the store and getting away with it." The People disagree, arguing when defendant decided to use her car to hit Skinner, "the goal of the assault became 'different' and 'more sinister . . . than mere successful [completion] of the original crime.'" (Citing *People v. Perry* (2007) 154 Cal.App.4th 1521, 1526-1527.)

We first review some pertinent cases, including those cited by the parties.

In the case of *In re Jesse F.* (1982) 137 Cal.App.3d 164, the victim was robbed and then forced to lie on the ground. When the victim got up and tried to run, he was assaulted. The court upheld separate punishment for robbery and assault, opining that "[w]hen there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable." (*Id.* at p. 171.) In particular, the court explained, "The fruits of the robbery were theirs and *their escape was apparently assured*. Their attempt to murder [the victim] as he fled constituted a separate act not necessary to effectuate the robbery. . . . [¶] . . . [Even though] the crime of robbery is not actually complete until the robber 'has won his way to a place of temporary safety[,]' . . . it cannot mean every act a robber commits before making his getaway is incidental to the robbery." (*Ibid*., italics added.)

In *People v. Johnson* (1969) 270 Cal.App.2d 204, the defendant and his accomplice entered a gas station, robbed the attendants at gun point, and left. The attendants did not resist or attempt to pursue the robbers. Nonetheless, as the robbers sped away, one of them fired a shot into the gas station at one of the attendants. The court upheld multiple punishment for robbery and assault. (*Id.* at p. 206; see also, e.g., *People v. McGahuey* (1981) 121 Cal.App.3d 524, 529 [multiple punishment for burglary and assault, where after the burglar left with property, he threw a hatchet at victim who was calling police].)

In *People v. Nguyen* (1988) 204 Cal.App.3d 181, the defendant and his accomplice entered a store. While the defendant took money from the cash register, his accomplice escorted a clerk into a rear bathroom, robbed him, and forced him to lie face down on the floor. The defendant shouted a Vietnamese phrase typically used when "'someone was to

kill or be killed.'" (*Id.* at p. 185.) The accomplice then kicked the clerk in the ribs and shot him in the back. (*Ibid*.) The court upheld multiple punishment for attempted murder and robbery, finding the shooting "constituted an example of *gratuitous violence* against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of Penal Code section 654." (*Id.* at p. 190, italics added.) "It is one thing to commit a criminal act in order to accomplish another; Penal Code section 654 applies there. But that section cannot, and should not, be stretched to cover *gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.* Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape, evade prosecution, or for no reason at all, may be found by the trier of fact to have been done for an independent reason." (*Id.* at p. 191, italics added; see also, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162 [where burglary was almost complete and victims had been neutralized, the gratuitous murder of one and assault of another to prevent reporting of the murder were separately punishable].)

On the other hand, in *People v. Guzman* (1996) 45 Cal.App.4th 1023, the victim saw some men take his motorcycle out of the garage, put it into their truck, and drive off. He chased them in his car and cornered them, whereupon they got out and assaulted him before leaving with the motorcycle. (*Id.* at pp. 1025-1026.) The court held section 654 barred multiple punishment for burglary and robbery. The court explained the burglars had not yet reached a place of temporary safety when they beat the victim, who had thwarted their escape. Consequently, since the burglary was still in progress when the robbery occurred, both offenses were committed pursuant to one objective—to steal the motorcycle—and there was but a single continuous course of conduct. (*Id.* at p. 1028; see also, e.g., *People v. Le* (2006) 136 Cal.App.4th 925, 929-931 [multiple punishment for burglary and robbery barred where violence was used against store employees trying to thwart escape]; *People v. Miller* (1977) 18 Cal.3d 873, 885 [burglary, robbery, and assault were incidental to primary objective of theft of contents of jewelry store]; *People v. Niles* (1964) 227 Cal.App.2d 749, 755 [assault committed while attempting to escape

from a burglary could not be separately punished]; *People v. Perry, supra*, 154 Cal.App.4th at pp. 1526-1527 [same, where defendant removed radio from car and then used pointed object to threaten owner who tried to thwart theft and escape]; but see, e.g., *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 465 [multiple punishment permissible for burglary and assaults, where the defendant entered a store, took merchandise, left, and then assaulted a security guard and motorist while trying to escape][5]; *People v. Hooker* (1967) 254 Cal.App.2d 878, 880-881, disapproved on other grounds in *People v. Corey* (1978) 21 Cal.3d 738, 746 [same].)

There appears to be a general approach in cases involving a theft and assault during a continuous course of conduct. Where (1) a perpetrator's primary objective is to steal another's property; (2) the perpetrator has successfully taken possession of the property; (3) the perpetrator has a relatively assured and unhampered means of escape with the property—e.g., the victim tries to run away from the perpetrator, the victim offers no resistance and does not attempt to pursue, or the victim is otherwise neutralized; and (4) the perpetrator nevertheless assaults the victim, courts find that the assaultive violence was gratuitous and unnecessary and committed for a malicious, vengeful, or sadistic reason unrelated to stealing property and successfully escaping with it. Accordingly, section 654 does not bar separate punishment for the assault. However, where the victim of a theft resists the taking or tries to thwart the perpetrator's escape, and in response, the perpetrator assaults the victim, courts do not consider the assault to be separate and independent of the theft. Instead, the assault is a means of completing the theft.

The People's claim to the contrary notwithstanding, the assault with a deadly weapon, robbery and burglary assault were all part of a continuous course of conduct.

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[5] In *People v. Vidaurri, supra*, 103 Cal.App.3d 450, the court declined to adopt a general rule that an escape with stolen property is or is not part of the continuous transaction including the underlying offense and instead relied on the general rule that divisibility of a course of criminal conduct depends on the perpetrator's intent and objective. (*Id.* at p. 464.)

The record fails to support the trial court's implied finding the assault was a divisible or constituted an independent act. After defendant left the Walmart store with the stolen merchandise, she went to her car, intending to drive away. However, Skinner caught up with her and tried to thwart defendant's escape by pulling her out of her car. In response, defendant used her car to assault Skinner, both to secure her possession of the stolen merchandise and to ensure her flight to safety. These circumstances do not suggest the assault on Skinner was a gratuitous afterthought committed for some malicious or vengeful purpose separate and independent of the burglary and robbery. Nor do the circumstances suggest defendant had some reason to assault Skinner other than to escape with the stolen merchandise. Rather, the assault was the means defendant used to commit the robbery, which was to achieve her objective of completing the theft of Walmart merchandise. Accordingly, we agree with defendant that section 654 barred the imposition of concurrent sentences for her burglary and assault with a deadly weapon convictions.

DISPOSITION

The sentences on counts 2 (assault with a deadly weapon) and 3 (commercial burglary) are stayed. In all other respects the judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.